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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-472

WALTER J. WOODMAN, et al.,

Petitioners,

v.

W. D. AMASON, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

WALTER J. WOODMAN,
507 Water Street,
Waxahachie, Texas 75165,
Counsel for Petitioners.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

	Page
List of Authorities	ii
Opinion Citation	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3-10
Reasons for Granting the Writ	12-23
Importance	23
Conclusion	24
Appendix	A-1 - A-13
Certificate of Service	24

Page

United States Constitution

Fifth Amendment 21

Fourteenth Amendment 21

United States Supreme Court Cases

Armstrong v. Ashley, 204 U. S. 272, 27 S. Ct. 270, 51 L. Ed. 482 13

Smith v. Orton, 21 How 241, 16 L. Ed. 104 ..... 13, 14, 22

U. S. v. California & O. Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354 ..... 13, 14

Ochoa v. Hernandez y Morales, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 14

Onraha Hotel Co. v. Wade, 97 U.S. 13, 24 L. Ed. 917 14

U. S. v. Linn, 1 How 104, 11 L. Ed. 64 14

Great Northern R. Co. v. Hower, 236 U. S. 702, 35 S. Ct. 465, 59 L. Ed. 798 14

Moelle v. Sherwood, 149 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350 14

Warner v. Morton, 20 How 448, 15 L. Ed. 950 15

Selma, R. & D. R. Co. v. U. S., 139 U. S. 650, 11 S. Ct. 638, 35 L. Ed. 266 15

U. S. v. Denver R. G. R. Co., 191 U. S. 84, 24 S. Ct. 33, 48 L. Ed. 106 15

Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. Ed. 556 15

Brush v. Ware, 15 Pet. 93, 10 L. Ed. 672 15

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063 15

Joy v. St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843 16

Page

May v. LeClaire, 11 Wall 217, 20 L. Ed. 50 16

Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164 16

Link v. Wabash R. Co., 370 U. S. 626, 82 S. Ct. 1368, 8 L. Ed. 2d 734 16

Castle v. Bullard, 23 How 172, 16 L. Ed. 424 16

Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 27 S. Ct. 184, 51 L. Ed. 436 16

Chapman v. Sheridan Wyo. Coal Co., 338 U. S. 621, 70 S. Ct. 392, 94 L. Ed. 393 16

Jennison v. Leonard, 21 Wall 302, 22 L. Ed. 539 17

Bissell v. Heyward, 96 U. S. 580, 24 L. Ed. 678 17

Gunton v. Carroll, 101 U. S. 426, 5 L. Ed. 985 17

Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923 21

Texas Cases

Bethea v. Lockhart (Tex. Civ. App. 1939) 127 S.W. 2d 1029, Ref. 3

Crain v. Firemen's & Policemen's Civil Service Com'n. (Tex. Civ. App. 1973) 495 S.W. 2d 20 8

Gulf Production Co. v. Continental Oil Co. (Tex. Sup. Ct. 1939) 132 S.W. 2d 553 ..... 9, 11

Forister v. Coleman (Tex. Civ. App. 1967) 418 S.W. 2d 550, Ref., n.r.e. 431 S.W. 2d 2 13

Valley Ready-Mix Concrete v. Valley State Bank (Tex. Civ. App. 1950) 227 S.W. 2d 231 14

Hexter v. Pratt (Tex. Com. App. 1928) 10 S.W. 2d 692 16

Patrick v. Webb (Tex. Civ. App. 1963) 369 S.W. 2d 446, 449 Ref., n.r.e. 19

Barnum v. Lopez (Tex. Sup. Ct. 1971) 471 S.W. 2d 567 19

List of Authorities — (Continued)

	Page
Smith v. Williams (Tex. Sup. Ct. 1967) 422 S.W. 2d 168	20
MacDonald v. Painter (Tex. Sup. Ct. 1969) 441 S.W. 2d 179	20
Burns v. Woods (Tex. Sup. Ct. 1973) 492 S.W. 2d 940	20
Federal	
15 U.S.C. Sec. 1401 et seq.	4
Texas	
Vernon's Ann. Civ. St. art. 1101a	4
Vernon's Ann. Civ. St. art. 1133	4
Vernon's Ann. Civ. St. art. 6626	2, 3, 5, 20, 21
Vernon's Ann. Civ. St. art. 6603	5
Tex. Rules of Civil Procedure, Rule 505	2, 20
Other	
Clark, Real Covenants and Other Interests Which "Run With Land" (1947)	9
Pomeroy: A Treatise on Equity Jurisprudence, Vol. III (1941)	8, 9, 17, 18

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Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The opinion of the Court of Civil Appeals of Texas at Waco, affirming the trial court, is found in 484 S.W. 2d 594. (Opinion fully printed in Appendix, pages A-1 to A-4.) The opinion of the Supreme Court of Texas reversing and rendering judgment for the Respondents is found in 16 THE TEXAS SUPREME COURT JOURNAL 321, ... S.W. 2d ... ..., (opinion not yet printed in Reporter series, opinion fully printed in Appendix, pages A-6 to A-10).

JURISDICTION

The opinion and judgment of the Supreme Court of Texas was entered on May 2, 1973 (Record 22, 23, Appendix A-11 to A-12). The Petitioners duly filed a Motion for Rehearing in

the Supreme Court of Texas, which was overruled on June 13, 1973 (Record 26, Appendix A-13). Notice of Appeal to this Court was filed with the Supreme Court of Texas on June 19, 1973 (Record 29). This appeal is perfected from the Order overruling the Motion for Rehearing and the jurisdiction of this Court is invoked under Title 28 United States Code Annotated, Section 1257 (2) and (3).

QUESTIONS PRESENTED

1. That the Supreme Court of Texas denied Petitioners due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution when they ruled that the burden of proof to prove Respondents did not possess actual knowledge of certain unrecorded contracts of sale was upon Petitioners.

2. That the Supreme Court of Texas denied Petitioners due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution in rendering judgment against Petitioners after having reversed the judgments of the lower courts on law that had not previously been applicable to the facts of the case herein; the proper course for the Supreme Court of Texas in such a case being to have remanded for a new trial.

3. That the Supreme Court of Texas denied Petitioners equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution when they refused to apply Rule 505 of the Texas Rules of Civil Procedure and have remanded the case for a new trial.

4. That Article 6626 of the Texas Civil Statutes which pro-

hibits unacknowledged instruments from being recorded in the deed records of Texas denies the Petitioners who purchased their land with unacknowledged contracts of sale due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

Article 6626, Texas Civil Statutes (Appendix, Page A-14) and Rule 505, Texas Rules of Civil Procedure (Appendix, Page A-14).

STATEMENT

This case brought by the Petitioners as a class action involves the refusal by the Texas Supreme Court to enforce ecological land use restricitve covenants which had been enforced by the trial court and the Texas Court of Civil Appeals at Waco, Texas, which restrictions had been imposed on a 371.2 acre tract in Ellis County, Texas, by the developers of a housing subdivision known as Grande Casa Ranchitos, and released by these same developers on the Respondents' tract alone after the sale of several tracts to purchasers under unacknowledged and therefore unrecorded contracts of sale. In an unincorporated area in Texas, as in many other places in the United States, the primary protection landowners who buy recently developed raw acreage have that they will not lose their investment are the building and land use restrictive covenants that the developers imposed on the land to enable them to sell the land at enhanced values, this being recognized by Texas law in *Bethea v. Lockhart,* (Tex. Civ. App. 1939) 127 S.W. 2d 1029, Writ of Error Refused. In an incorporated area the legislative bodies of cities

and incorporated villages are given the protection of zoning powers, Vernon's Ann. Civ. St. art. 1101a. However, in Texas a minimum of 200 inhabitants are necessary to incorporate, Vernon's Ann. Civ. St. arts. 1133 et seq., and any group that has less than this has no such protection, thus leaving a number of people with no adequate safeguards to insure that a certain minimum standard of construction and land use will be met, other than the restrictive covenants they relied upon at the time they purchased. Realizing the inequities of this situation, there have been various attempts, both federal and state, to provide for land use control (e.g. the Texas Legislature recently had before it House Bill No. 105, which would have given the County Commissioner's Court zoning power outside of incorporated cities and towns, but the vested interest lobby got together and defeated this bill). The growth of the sale of rural land has been thriving. Sales have gone from an estimated $500 million in 1963, to $6 billion at the present (Dallas Morning News, Business Section, August 20, 1973, Page 7B). The problems arising from these sales caused the United States Congress to pass the Interstate Land Sales Full Disclosure Act and provided for the creation of an Office of Interstate Land Sales under the Housing and Urban Development Department, 15 U.S.C. § 1401 et seq. Unfortunately, this Act only protects against *interstate* land sales and was passed too late to effect the facts in the present case. The way that most sales at developments like the one in our case are made by contracts for sale or Contracts for Deed as they are sometimes called. These contracts are very one-sided and definitely favor the seller, providing for such things as acceleration clauses, the withholding of the deed until all payments which may take several

years, have been made, and so forth (see Contracts for Deed, Record 2, Plaintiffs' Exhibits 4, 5, 6). These contracts are not acknowledged, that is, they are not signed before an officer authorized to take such acknowledgment, the person who executes the instrument stating to such officer, the words generally being incorporated into the instrument, that he "had executed the same for the consideration and purposes therein stated" and the officer then signing and sealing same, Vernon's Ann. Civ. art. 6603, (Record 2, Plaintiffs' Exhibits 4, 5, 6, showing no provision for same). Since they are not acknowledged, they cannot, under Texas law, be recorded in the deed records, Vernon's Ann. Civ. St. art. 6626, and for this reason, such instruments are greatly favored by real estate developers who are financing the land sale themselves, since no foreclosure proceedings are necessary as would be the case with a Warranty Deed with a vendor's lien secured by a Deed of Trust, all of which would be recorded there being provisions for same. The procedure in Contracts for Deed in the instant case merely requiring the seller to give written notice that the entire balance on the installments is due within ten days of notice (the seller exercising his acceleration clause), the purchaser having previously agreed under the terms of the contract that all previous payments may be retained by the seller as liquidated damages (see Contracts for Deed, Record 2, Plaintiffs' Exhibits 4, 5, 6). Hence the developer can go around selling the same lot several times each time retaining the installments paid as liquidated damages and the deed records would reflect none of this, the legal title, usually in the form of a Warranty Deed with vendor's lien and secured by a Deed of Trust, still being in the seller as far as the deed records are concerned. These official looking

documents, the Contracts for Deed, give even the most wary of purchasers a false sense of security.

The facts in our case are that on February 28, 1968, the developers of Grande Casa Ranchitos, Tom and Jane Sewell, Ben D. Atwell II, and A. M. Byram placed restrictive covenants on the land then owned by them. Between May 11 and June 23, 1968, the owners of this land sold seven lots by contracts of sale or deed, three of which were admitted into evidence, these being to the Sitzes, McFadins and Selfs (Record 1, Page 83, Record 2, Plaintiffs' Exhibits 4, 5, 6). Now these contracts were unrecordable as per Texas law previously cited, since they were unacknowledged. Since these contracts could not be recorded they were not in fact recorded. On June 28, 1968, the same developers without the joinder of these three property owners executed a release of restrictive covenants on what subsequently became the Respondents' tract. But after the release and before the Respondents bought the property, Tom and Jane Sewell, two of the developers, purchased the property for themselves on November 25, 1968, by a properly recorded deed, and then on September 23, 1969, sold their tract to Respondent Wayne O. Glick, also by a properly recorded deed. Of course, in the mean time a number of people at the development had taken their property by deeds. Subsequently to the release but before the Respondents' purchase, the developers realized that they had improperly released the restrictions on the lot in question, therefore, Tom and Jane Sewell, recorded in the deed records an affidavit, a copy of which appears in the Record herein (Record 1, Page 83). This instrument stated that at the time of the release of the restrictions on the lot in question, that seven contracts for sale had been executed on seven lots that

had been sold, that these contracts for sale were unrecorded, and stated falsely that even though it was not necessary for this to be done the developers had gotten the consent of these seven lands owners to the release of restrictions, and then went on to identify the lots by the owners name, lot number, and the amount of acreage purchased. The affidavit also identified the purported release of restrictions by referring to its date of execution, date of filing and volume and page number where same could be found. At the time of trial, this affidavit was marked as Plaintiffs' Exhibit No. 8 (Record 2). The next morning after the trial had ended, and after the jury had been dismissed, but before Counsel for Petitioners had arrived in Court, and before Counsel for either party had argued the case to the trial court, Counsel for the Respondents, Ben D. Sudderth, in what would appear to be an attempt to destroy an exhibit that had been offered and admitted into evidence, same being an exhibit of opposing Counsel, without opposing Counsel's permission or approval, stuck paper all over Plaintiffs' Exhibit No. 8 with scotch tape so that same could not be removed without damaging the exhibit, so that the exhibit now appears as it does in this Record (Record 2, Page 70, Record 3, Page 28). The case which had been tried on the theory of Petitioners' co-Counsel, Tom Crum, was argued by him (Record 3). The action of Mr. Sudderth with regards to the mutilated exhibit was brought to the attention of the Texas Supreme Court and ignored by them, they apparently approving this conduct sub-silencio (Record 9, Page 28, Record 21, Page 20), the Texas Supreme Court prefering to play the "see no evil, hear no evil, say no evil" game whereby they state in their opinion "Plaintiffs relied upon the one sentence of the affidavit, but it was not proof

either of constructive or actual notice to defendants. The sentence does not locate any land by survey, subdivision or county. It does not disclose the author of the affidavit. There is no other proof that the defendants possessed actual notice of the contracts for deed." However, the Court of Civil Appeals had held in their decision that "Had this entire instrument been introduced in evidence (a copy of the entire instrument appears in the transcript) it would have established defendant had constructive notice of the contracts of sale," 484 S.W. 2d 594, 595, thus recognizing the truth of the matter which the Texas Supreme Court refused to recognize, the Court of Civil Appeals following the proper course since this was a case in equity and not in law. As a recent Texas decision, *Crain v. Firemen's & Policemen's Civil Service Com'n.*, (Tex. Civ. App. 1973) 495 S.W. 2d 20, stated in discussing the equitable remedy of an injunction, which is what is involved in our case, at 495 S.W. 2d 24:

> [7] On the merits of the petition for writ of injunction it is noticed in 4 Pomeroy's Equity Jurisprudence, 5th Ed., p. 935, "Injunctions in General", Sec. 1338, "Fundamental Principle" it is stated, as follows: "The general principle may be stated as follows: Wherever a right exists or is created by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise* * * *"
>
> [8] In Section 1339, "Generally" succeeding that from

> which Pomeroy's language is quoted, it is furthermore stated, as follows:" * * * Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement, according to its essential nature * * *"

Our case involved a permanent injunction which the Texas Texas Supreme Court dissolved. Our case involved the equitable enforcement of equitable restrictive covenants, and was purely a question of equity, not law. Our case involved the rights of equitable title holders, those who purchased under contracts for sale or deed which were unrecordable under Texas law. The release of restrictive covenants, relied upon by Respondents, and the only document that gave them any authority to violate the restrictive covenants applicable to all the other tracts, specifically states that the developers were all the owners of record (see Record 1, Page 81) thus placing a prudent man on inquiry so as to ascertain the existence of non-record equitable owners, such as such an inquiry would have revealed in our case, *Gulf Production Co. v. Conitnental Oil Co.,* (Tex. Sup. Ct. 1939) 132 S.W. 2d 553, 568. Judge Pope's citation to Clark's book, is misplaced. A reading of this work, Clark, Real Covenants and Other Interests Which "Run With Land" (1947), shows that only one chapter is applicable to our case and that is Chapter VI. Now in this chapter, Clark never states what Judge Pope has imputed to him, namely, the proposition that "The defendants say that they purchased their eight acre lot for value and they took without notice of the non-joinder of the equitable owners," this proposition being a creation of the fertile mind of

Judge Pope, who, after stating the proposition almost says, sic probo, or thus I prove it, and then he cites Clark, an authority never raised by the Respondents, their proposition of law, before Judge Pope got a hold of it being that they were bona fide purchasers as a matter of law (Record 17, Page 3). Clark never talks about contracts for sale and their effect on restrictive covenants, or the notice requirement as to equitable titles versus legal title, these are strictly creations of the Texas Supreme Court, as far as their being applicable to a restrictive covenant situation. The Texas Supreme Court went on to hold that the burden to prove Respondents were not good faith purchasers (a matter entirely within Respondents' knowledge) was on the Petitioners and that the Petitioners had failed to discharge their burden. In other words, Petitioners had the burden to prove the negative of a matter entirely within another person's knowledge, that is, notice. The Texas Supreme Court in placing this impossible burden of proof upon Petitioners admitted in their opinion by stating "The general rule in Texas, *in other areas of the law,* * * *" that this doctrine had never previously been applied to the instant type of case. Yet, the Texas Supreme Court then went on to deny the Petitioners the chance to discharge this burden by rendering judgment for Respondents on this hitherto inapplicable law! An incredible ruling to say the least that surely violates due process of law and equal protection of the law under the U.S. Constitution.

During the trial of the case, the Respondent who had handled the actual transaction that culminated in the conveyance of the tract, Freddie Glick, was cross-examined and testified as follows:

Q. And so you would be aware of all the documents that were on file then that pertained to your particular tract of land; is that correct?

A. I am, I might should be.

Q. Do I take it your answer is yes?

A. Yes. (Record 2, Page 63).

Previously, Respondent Wayne O. Glick, the husband of Freddie Glick, the father of Wynnette Amason and the father in law of W. D. Amason, and the person in whose name the legal title was, had testified that an attorney by the name of Dick Chapman had acted as their agent when he checked the Deed Records of Ellis County, Texas (Record 2, Pages 56, 57). Respondent Freddie Glick later testified that the said Dick Chapman had reported to her all the documents that he found or that pertained to her tract (Record 2, Pages 62, 63). Petitioners showed that amongst these documents was the affidavit found in the Record 1 at Page 83. Certainly, this should have established that the Respondents had notice of the unrecordable contracts for deed. All during this portion of the trial, Ben D. Sudderth, Counsel for the Respondents, was continuously interrupting cross-examination and coaching his clients when they made declarations against their interests (Record 2, Pages 56-70). Wayne O. Glick had previously testified that he assumed people were buying land in the area when he bought at the development (Record 2, Page 53). This raises the question as to whether the Texas Supreme Court applied the right rule of law in deciding burden of proof rather than whether Glick acted as a prudent man to ascertain the equitable owners as he was required to do by *Gulf Production Company*, supra.

In their opinion, the Texas Supreme Court makes the statement, unsupported by any evidence of any sort, that "The Glick's daughter, Mrs. Amason, and her husband, were living in the mobile home at the time of trial." This is a completely false statement and wholly untrue. This is a total fabrication, totally unsupported by any evidence, the untruth of which Petitioner Woodman is well aware by virtue of the proximity of his home to the mobile home (100 feet according Wayne O. Glick, Record 2, Page 51). Petitioners pointed out this glaring error in their Motion for Rehearing but the Texas Supreme Court refused to change it, even though eliminating this untruth would not have effected the substantive portion of their opinion and ruling (Record 24, Pages 22-24). Petitioners raise this matter before this Honorable Court to show the slipshod and arbitrary fashion in which the Texas Supreme Court disposed of this case, and this is said with all due respect to the Texas Supreme Court. Thus, for all time, unless corrected by the United States Supreme Court, this untruth will become a permanent part of the case history of this Country, for all future generations to rely upon.

REASONS FOR GRANTING THE WRIT

1. The United States Supreme Court has consistently held that the bona fide purchase or innocent purchaser for value without notice defense is an affirmative defense and the burden of proof to prove this defense is upon the party relying upon the defense particularly so when the defense requires, as in the instant case, testimony peculiarly within the knowledge of the party relying upon the defense.

As this Court held in *Armstrong v. Ashley*, 204 U. S. 272, 27 S. Ct. 270, 51 L. ed. 482:

> "The owner of real estate is under no obligation to watch the records to see whether some one who does not own his property has assumed to * * * convey it by deed to some third party."

In *Smith v. Orton*, 21 How 241, 16 L. ed. 104, this Court stated:

> "Knab held the naked legal title with undoubted right in Hubbard to call for its surrender and his assignee stands on the same footing 4 Kent's Com. 157"

The evidence in our case and the ruling of the Texas Supreme Court shows that the developers who only held the naked legal title and had already departed with several equitable titles by contracts for deed, illegally and improperly released the restrictive covenants on the Respondents' tract by not having the joinder of the equitable owners in releasing same. The question then became, according to the Texas Supreme Court, on whom was the burden to prove that the Respondents had notice of the equitable owners who had failed to ratify the release of restrictive covenants. The Respondents had defended the invalid release of restrictive covenants on the grounds that they were not bound by the lack of the joinder of the equitable owners because they had no notice of their equities, that is, they were bona fide purchasers. To establish this defense, three elements are necessary, (1) the person so claiming acted in good faith, (2) he paid valuable consideration, and (3) he had no notice of the defect or of others rights in the same matter, *Forister v. Coleman*, (Tex. Civ. App. 1967) 418 S.W. 2d 550, Writ Ref., 431 S.W. 2d 2; Ibid, *U. S. v. California &*

O. Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354. Generally this is an affirmative defense, *Valley Ready-Mix Concrete v. Valley State Bank*, (Tex. Civ. App. 1950) 227 S.W. 2d 231. The Texas Supreme Court realized the deficiency of this defense so they twisted it around to suit a better and more clear-cut ruling on their part and rephrased the question to read that Respondents "purchased their eight-acre lot for value and they took without notice of the non-joinder of the equitable owners" thus being able to *squeeze* the case into the hitherto inapplicable Texas cases that say that "the one who relies upon an equitable title to land as against a subsequent owner of the legal title assumes the burden of showing that the latter is not an innocent purchaser for value and without notice," thus being able to dispense with the necessity of good faith which would have been required under the bona fide purchaser defense. But the U. S. Supreme Court has held otherwise in similar cases involving affirmative allegations such as this, including the bona fide purchase defense, see *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. ed. 1427; *Onraha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917; *U. S. v. Linn*, 1 How 104, 11 L. ed. 64; *Great Northern R. Co. v. Hower*, 236 U. S. 702, 35 S. Ct. 465, 59 L. ed. 798; *Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. ed. 350. It is clear under these rulings and under the ruling of *Smith v. Orton*, supra, that not only was the burden on the Respondents, but the Respondents, as assignees of the developers, stood on the same footing as the developers in having notice, otherwise the owners of property under unrecordable contracts for deed would always have to be watching the records to see whether or not the developers may sell their land or remove the restrictions

without their consent. After the release had been accomplished, the developers turned around and conveyed the lot in question to two of their numbers, namely, Tom and Jane Sewell, who thereafter sold it to Respondent Wayne O. Glick. As this Court stated in *Warner v. Morton*, 20 How 448, 15 L. Ed. 950:

> "If the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation."

And the fraud here of not getting the joinder of the equitable owners in releasing the restrictions is abundantly clear. The U. S. Supreme Court has further stated in *Selma, R. & D. R. Co. v. U. S.*, 139 U. S. 650, 11 S. Ct. 638, 35 L. ed. 266, that:

> "The burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

Good faith, valuable consideration, absence of notice, are all matters peculiarly within the knowledge of the person relying upon them, in our case, the Respondents. Also see *U. S. v. Denver & R. G. R. Co.*, 191 U. S. 84, 24 S. Ct. 33, 48 L. ed. 106. As to notice the Petitioners submit the following authorities:

Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556;

Brush v. Ware, 15 Pet 93, 10 L. ed. 672;

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063, which holds at 35 L. ed. 1072, as follows:

> "He [the purchaser] must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice."

Joy v. St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843, (which deals with covenants running with the land).

The Respondents testified that their attorney checked the deed records, and that he told them of all the documents to be found therein that pertained to their tract. Notice to an attorney is to notice to his client, see the following:

> *Hexter v. Pratt,* (Tex. Com. of App. 1928) 10 S.W. 2d 692;
>
> *May v. LeClaire,* 11 Wall 217, 20 L. ed. 50;
>
> *Rogers v. Palmer,* 102 U. S. 263, 26 L. ed. 164;
>
> *Link v. Wabash R. Co.,* 370 U. S. 626, 82 S. Ct. 1386, 8 L. ed. 2d 734.

The U. S. Supreme Court has stated in *Castle v. Bullard,* 23 How 172, 16 L. ed. 424, that:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is sufficient, and, in most cases, is the only proof that can be adduced."

The fraud of the developers in releasing restrictions after the sale of unrecordable contracts for deed is clear in the Record of this case. Also see *Wecker v. National Enameling & Stamping Co.,* 204 U.S. 176, 27 S. Ct. 184, 51 L. ed. 436.

As to restrictive covenants, Petitioners submit the case of *Chapman v. Sheridan-Wyoming Coal Co.,* 338 U. S. 621, 70 S. Ct. 392, 94 L. Ed. 393, which states:

> "Equitable restrictions as to the use or disposition of land are real estate, part and parcel of the land to which they attached, and pass by conveyance."

Petitioners submit that under this doctrine, once the equitable

restrictions have attached they cannot be removed unless properly removed by the concurrence of all landowners, and the improper removal of same, as in our case, causes the purchaser to receive from his seller no greater interest in same than what the seller had, which in this case would be a purported release that was a nullity, and thus the restrictions pass intact to the Respondents, otherwise Respondents would be allowed to obtain a *greater* interest than what they bought by virtue of their purported lack of notice of the equitable rights of others, as the Texas Supreme Court would have it.

The U. S. Supreme Court has consistently held that in a sales contract of real estate where the record title remains in the vendor, the vendor is a trustee of the legal title for the vendee to the extent of his payment and the vendor cannot do anything to violate this trust, e.g. *Jennison v. Leonard,* 21 Wall 302, 22 L. Ed. 539; *Bissell v. Heyward,* 96 U. S. 580, 24 L. Ed. 678; *Gunton v. Carroll,* 101 U. S. 426, 5 L. Ed. 985. Yet the Texas Supreme Court would allow a violation of this trust to benefit a wrongdoer who purchases from such trustee, as under the facts of our case.

Pomeroy in his work entitled, A Treatise on Equity Jurisprudence, Vo. III, (Bancroft-Whitney Company, San Francisco, the Lawyers Co-Operative Publishing Company, Rochester, N. Y., 1941) by John Norton Pomeroy, states in Sec. 735, as follows:

> "In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometimes seem to have extended the doctrine of *bona fide* purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the

> courts of many states, even when acting as tribunals of law, to make the doctrine a legal *rule of property*, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A *subsequent* holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a *subsequent* title was necessarily the better one."

The question in our case was purely one of equity and not of law. It was not as the Texas Supreme Court erroneously interpreted the case to be of equitable title versus legal title but rather the enforcement of equitable rights or the non-enforcement of equitable rights because of a purported release of these equitable rights and on whom should the burden fall to prove the property is unrestricted, on the person seeking to enforce the restrictions, or on the person seeking to defeat the restrictions. Petitioners humbly submit that it is on the latter. Since the issue was one solely of equity the Texas Supreme Court denied the Petitioners due process and equal protection of the law in applying law doctrines to their case, and should have resolved the case solely on equity.

2. That the action of the Texas Supreme Court in failing to remand the instant case for a new trial after having reversed the case on the basis of hitherto inapplicable law denied Petitioners due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

The authorities cited by the Texas Supreme Court in support

of their proposition that the burden of proof was upon the Petitioners in this case since they relied upon equitable titles as against the Respondents' so called "legal" title had never previously been applied in Texas to a restrictive covenant situation, and this is by the Texas Supreme Court's own admission, wherein they state in the instant opinion, "The general rule in Texas, *in other areas of the law,* * * *). As a matter of fact this rule has never been previously applied in a case like the instant one in any other jurisdiction anywhere in the world, and in their Motion for Rehearing the Petitioners challenged the Texas Supreme Court to come forth with just one other citation that ruled similarly to them on this question of restrictive covenants, and of course, they were unable to do so, there being no such authorities (Record 24, Page 26). Thus, it is clear that in rendering judgment for the Respondents, rather than remanding for a new trial, after having reversed the case on the basis of hitherto inapplicable law, by their own admission, the Texas Supreme Court was attempting to deny Petitioners their right to prove their case by discharging this new burden that the Texas Supreme Court had placed upon them. In effect what the Texas Supreme Court did was to change the rules and then rule against the Petitioners for not having followed this change in the rules from the first place, certainly a questionable procedure, especially when the general rule in Texas itself is that a Court should generally remand for a new trial after reversal, *Patrick v. Webb,* (Tex. Civ. App. 1963) 369 S.W. 2d 446, 449, Ref., n.r.e.; *Barnum v. Lopez,* (Tex. Sup. Ct. 1971) 471 S.W. 2d 567. This denial of the Texas Supreme Court of a new trial in this case was merely part of a continuous attempt on their part to impose their reactionary philosophy of the free

use of land as exemplified by every decision of the Court over the last few years involving restrictive covenants wherein they have consistently struck the covenants down. See *Smith v. Williams,* (Tex. Sup. Ct. 1967) 422 S.W. 2d 168, (an opinion by Assoc. Jus. Walker, the man with the greatest tenure on the Texas Supreme Court at the present time); *MacDonald v. Painter,* (Tex. Sup. Ct. 1969) 441 S.W. 2d 179, (an opinion by Assoc. Jus. Pope, the author of the opinion in the instant case, also a man with great tenure on the Texas Supreme Court, wherein he reverses the Court of Civil Appeals which had reversed then District Court Judge and now Assoc. Jus. Reavley of the Tex. Sup. Ct., who had ruled against the restrictions); *Burns v. Woods,* (Tex. Sup. Ct. 1973) 492 S.W. 2d 940, (an opinion by Assoc. Jus. Steakley, the man with the next highest tenure Walker as an Assoc. Jus.); *Amason v. Woodman,* (Tex. Sup. Ct. 1973) ..... S.W. 2d ..... (another opinion by Assoc. Jus. Pope). Rule 505, Texas Rules of Civil Procedure requires the Texas Supreme Court to remand a case for a new trial in the interest of justice. Surely in the interest of justice when new law has been applied to a fact situation not previously bound by such law a new trial should be ordered. The failure of the Texas Supreme Court to apply Rule 505 to the instant case is a blatant denial of the Petitioners' rights to due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

3. That Art. 6626, Texas Civil Statutes, which requires that instruments be acknowledged before they can be recorded in the deed records denies all purchasers under instruments that are not acknowledged such as contracts for deed and other equitable titles due process of law and equal protection of law

under the Fifth and Fourteenth Amendments to the United States Constitution.

The contracts involved in the present case cannot, under Texas law, be recorded. (See Art. 6626, Appendix). Since they cannot be recorded they cannot be used to give notice, both actual and constructive depending on whether one actually checks the deed records or whether by the mere recording of the instrument notice is given (if it falls in one's chain of title) as the purpose of the deed records is to give notice to the public of the status of land as to title, restrictions, encumbrances, easements, etc. Hence no notice by virtue of the deed records in Texas can be given by those who hold under contracts for deed. The Fifth Amendment to the U. S. Constitution provides:

> "* * * nor [shall any person] be deprived of life, liberty or property, without due process of law * * *"

The Fourteenth Amendment provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, this Court said:

> "* * * that equal protection and security should be given to all under like circumstances * * * that no greater burden should be laid upon one than are laid upon others in the same calling and conditions * * *"

The owners of equitable title have all the rights to possession, to ownership, to use of the land, and all other rights as the owner of legal title, the only difference in their ownership being that one owns by virtue of an unrecordable contract and the other

by virtue of a recordable deed. Thus the one who has a deed is given a slightly greater edge, that is, he can record his instrument in the deed records and thus give public notice. If the equitable owner tries to record his instrument he may open himself up to a suit for damages for clouding the legal title of the holder of the deed. It is because of this great inequity that Courts talk of the holder of legal title who has sold his land to someone by a contract as holding the mere "naked" legal title, *Smith v. Orton,* supra. The Texas Supreme Court, even with the knowledge that same could not be recorded and thus give notice to the public, still put the burden of proof upon the holders of the equitable title to show that the holder of the legal title had notice of the equitable owner's interest, and thus gave the holder of legal title greater rights than the holder of equitable title, who, through no fault of his own, but because of Art. 6626, cannot record his document, and this surely gives one upon the same calling and condition greater rights as both are landowners, the only difference in their ownership is in the documentation, one having a contract and the other a deed; but isn't a deed really a form of contract anyway? And doesn't this greater right in one over the other deny the one not chosen equal protection and due process of law? Shouldn't all have equal access to the public records so that all can give notice? Or, if one party such as the holder of legal title has access to the deed records for purposes of recording and if the other party such as the holder of equitable title does not, shouldn't the one who has access to the public records, that is, the holder of legal title be called upon to carry the burden of proof if he claims that he is a bona fide purchaser or an innocent purchaser without notice? Just because his instrument

has been recorded and the other person's could not why should the former be given greater rights as to burden of proof?

IMPORTANCE

The questions presented here are of vital importance to the Petitioners as individuals because their very homes are at stake, to housing developments and land sales everywhere and to the several states. The opinion of the Texas Supreme Court follows no concrete precedents, and their action in refusing to remand this case for a new trial after reversing the lower courts on the basis of hitherto inapplicable law obviously violates the due process and equal protection of the law provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court, and after such review the decision of the trial court and of the Court of Civil Appeals at Waco, Texas, should be affirmed and the decision of the Texas Supreme Court reversed, or alternatively, the decision of the Texas Supreme Court should be reversed and the case remanded for a new trial.

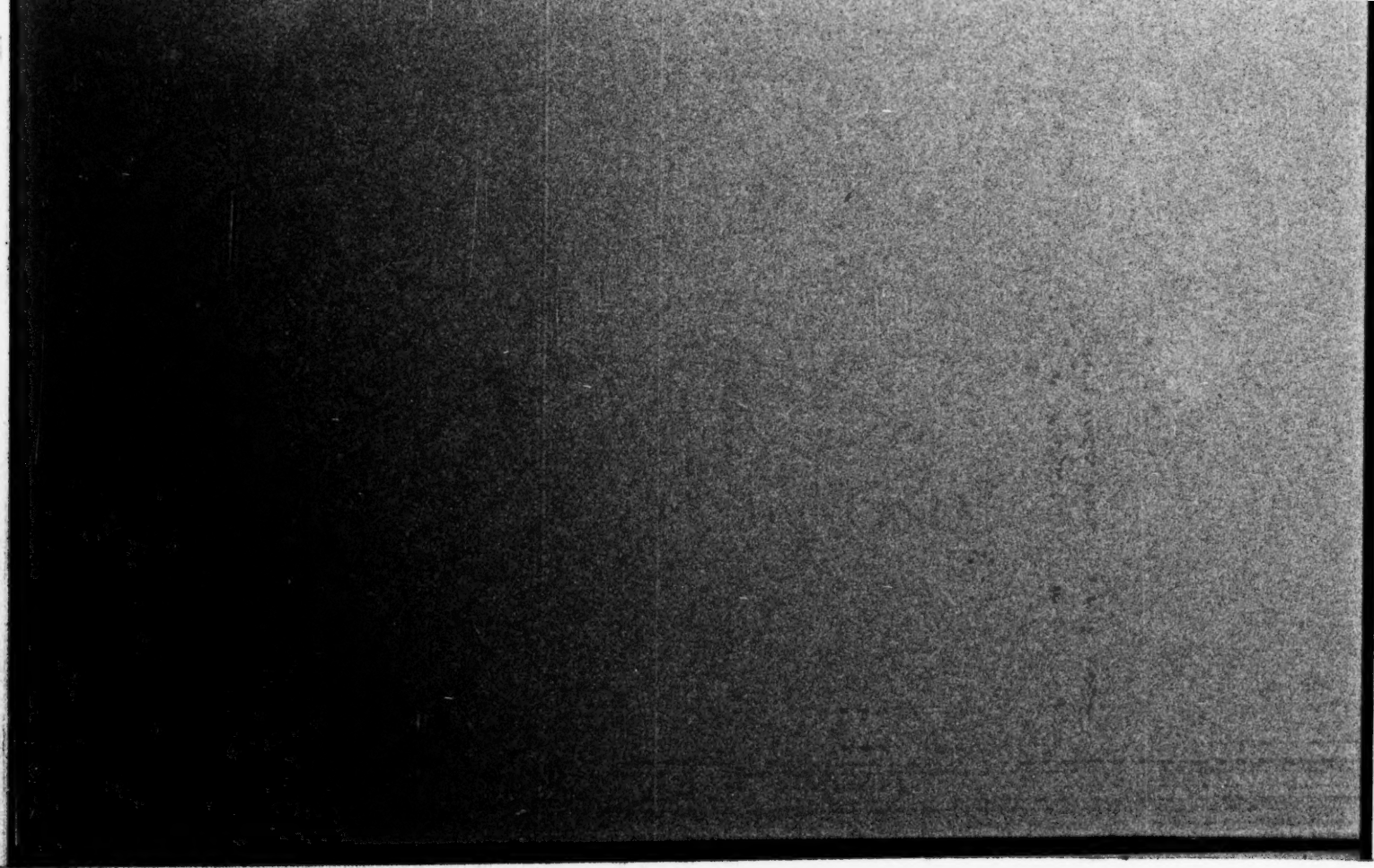
Respectfully submitted,

WALTER J. WOODMAN,
507 Water Street,
Waxahachie, Texas 75165,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of September, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Ben D. Sudderth, Exq., 109 W. Grand, Comanche, Texas 76442, Counsel for Respondents. I further hereby certify that all parties required to be served have been served.

Walter J. Woodman



Affirmed 10 August, 1972

No. 5170

In the

COURT OF CIVIL APPEALS

FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

W. D. AMASON, et ux, et al.,

Appellants,

v.

WALTER J. WOODMAN, et al.,

Appellees.

From 40th Judicial District
Court Ellis County, Texas

OPINION

This is an appeal by defendants Amason, et al, from judgment decreeing land owned by them, subject to restrictive covenants; and ordering defendants to remove a mobile home from their property.

Plaintiffs Woodman, et al, brought this suit to enforce restrictive covenants prohibiting trailer houses on real property owned by defendants Amason, et al. Trial was to the court which rendered judgment decreeing the defendants' land subject to such restrictive covenants; that a release of the land from such covenants was invalid; permanently enjoining defendants

from violating the restrictions, and ordering defendants to remove a mobile home from their property.

Defendants appeal on 2 points, contending "the evidence established as a matter of law that defendants were bona fide purchasers for value without notice".

Restrictive covenants were placed on Grande Casa Ranchitos No. 2, comprising 371.249 acres, by the owners Tom Sewel, Jane Sewell, Ben Atwell, and A. M. Bryan on February 15, 1968, and recorded in the Deed Records of Ellis County. Such restrictions prohibited "* * * house trailers * * * unless enclosed in a building or out of sight behind a screening fence at least 6 feet high and constructed of materials that cannot be seen through". Thereafter on June 28, 1968, Tom Sewell, Jane Sewell, Ben Atwell, and A. M. Bryan executed "a Release of Restricting Covenants", releasing from the restrictive covenants executed on February 15, 1968, the 8.34 acre tract, now owned by defendants. Such release was recorded in the Deed Records of Ellis County on July 16, 1968. The two Sewells, Atwell and Bryan were the only owners of record of Grande Casa Ranchitos No. 2 on the date of the execution of the release of the 8.34 acre tract.

Defendants purchased the 8.34 acres on September 23, 1969 for a valuable consideration.

After February 15, 1968, and before June 28, 1968, the owners of Grande Casa Ranchitos made contracts to sell lots in the subdivision to Donnie L. Self and wife; Albert Terry Sitz and wife; and Henry Truman McFadin and wife, which were never recorded in the Deed Records of Ellis County, but which contracts are in evidence in this case.

Defendants testified they had no knowledge of any contracts to purchase any tracts in the subdivision which may have been outstanding on the date of the release of the restrictive covenants, and further that they had a lawyer to check the deed records of Ellis County for records that might pertain to the tract they purchased.

There is in evidence that an instrument was duly filed and recorded in the Deeds Records of Ellis County on December 2, 1968, which recites "* * * the only tracts sold under contract of sale were to * * * Henry Truman McFaddin and wife * * * Albert Terry Sitz and wife * * * Paul C. Vandiver and wife * * * Sammie Ray Dowell and wife * * * Donnie L. Self and wife * * * Billy R. Jones and wife * * *"[1]

Those with contracts to purchase tracts in the subdivision were beneficial owners with equitable title. *Leeson v. City of Houston*, S. Ct. 243 S.W. 485, 489; and some of the owners of property in a restricted subdivision may not release such restrictions without the concurrence of the others who own property in the subdivision. *Smith v. Williams*, S. Ct. 422 S.W. 2d 168.

Thus since those with contracts to purchase lots in the subdivision did not join in the June 28, 1968, release, it is ineffective to release the 8.34 acres from the restrictive covenants, if a purchaser had either constructive or actual notice of same.

But since the contracts of sale were not of record, defendants did not have constructive notice that such release was ineffective.

[1] Had this entire instrument been introduced in evidence (a copy of the entire instrument appears in the transcript) it would have established defendant had constructive notice of the contracts of sale. Smith v. Bowers, CCA (NWH) 463 S.W. 2d 222.

Defendants assert that they were bona fide purchasers without actual notice as a matter of law. The only evidence that defendants had no knowledge of the outstanding contracts of sale was the defendants' own testimony. There is in evidence the contracts of sale of lots in the subdivision to Self, Sitz and McFadin, made prior to the release of the restrictions, and the excerpt from the instrument recorded in the Deed Records of Ellis County, recorded before defendants purchased the 8.34 acre tract, reflecting contracts of sale to Self, Sitz and McFaddin.

Defendants were interested witnesses. The trial judge had the right to pass on the credibility of such witnesses and the weight to be given their testimony. *Simmonds v. St. Louis, B & M Ry.*, S. Ct. 91 S.W. 2d 332. *Cochran v. Wool Growers Central Storage Co.*, 166 S.W. 2d 904. We think under the record he was authorized to believe that defendants did not carry their burden to establish that they had no actual notice.

All defendants' points have been considered and are overruled.

AFFIRMED

/s/ FRANK G. MCDONALD

Chief Justice

In the

SUPREME COURT OF TEXAS

FROM ELLIS COUNTY, TENTH DISTRICT

No. B-3655

W. D. AMASON, et al.,

Petitioners,

v.

WALTER J. WOODMAN, et al.,

Respondents.

Plaintiff, Walter J. Woodman, instituted this suit as a class action to enforce a restrictive covenant which prohibits mobile homes in a subdivision known as Grande Casa Ranchitos No. 2 in Ellis County. The trial court granted plaintiffs' prayer for injunction that defendants W. D. Amason and wife and Wayne O. Glick and wife permanently move their mobile home from their eight-acre lot. The court of civil appeals affirmed the judgment of trial court. 484 S.W. 2d 594. The only question presented is whether, as held by the court of civil appeals, the defendants had the burden to prove that they did not possess actual knowledge of certain unrecorded contracts of sale which were executed prior to a release of defendants' lot from the restrictive covenants by the original subdivision owners. We hold that the burden of proof was on the plaintiffs. We reverse the judgments of the courts below.

On February 28, 1968, Tom and Jane Sewell, Ben Atwell and A. M. Byram owned 371.2 acres of land in Ellis County. On that date they recorded a set of restrictive covenants on the

land, one of which prohibited the use of house trailers on the land. Between May 11 and June 23, 1968, the owners sold three lots by contracts for deed to the Sitzs, McFadins and Selfs. None of those contracts was recorded. On June 28, 1968, all of the original owners of the subdivision executed and recorded a release of the restrictions insofar as they affected the eight-acre lot which is here in question. Those persons holding under the unrecorded contracts for deed did not join in the release. Tom and Jane Sewell then purchased the released lot on November 25, 1968, and they recorded their deed. The Sewells sold their lot to Wayne Glick on September 23, 1969, and in December, 1971, he moved a mobile home onto the lot. The Glicks' daughter, Mrs. Amason and her husband, were living in the mobile home at the time of trial. Plaintiff Woodman obtained his deed to a seven-acre lot in the subdivision on May 6, 1971.

Plaintiffs' proof consisted of the recorded restrictive covenants which reached the original 371 acres of land, the subsequent deed from the original owners to Woodman of a seven-acre lot within the subdivision, the several unrecorded contracts for a deed, and the fact that the defendants had moved a mobile home onto their eight-acre lot which was within the original 371-acre subdivision. The defendants then proved the release of the original restrictive covenants as to their eight-acre lot and their deed which was executed after the release was recorded. They proved that they purchased their lot for $8,902.09 and assumed a lien in the sum of $13,597.91. They denied any knowledge of the unrecorded contracts and asserted their belief that their lot was released from the restrictions.

After the defense rested, plaintiffs offered in evidence, for impeachment purposes only, part of an affidavit which was recorded on December 2, 1968, in the Ellis County Clerk's office. The only part of the recorded affidavit which plaintiffs introduced is the one sentence:

> The only tracts sold under contracts of sale were as described by an unrecorded survey plat as Tract 1 of 4.718 acres sold to Henry Truman McFadin and wife, Mary Jane McFadin; Tracts No. 6 and 7 of 7.500 acres sold to Albert Gerry Sitz and wife, Ruby Nell Sitz; Tract No. 10 of 2.500 acres sold to Sammie Ray Dowell; Tract No. 29 of 3.178 acres sold to Danny L. Self and wife, Gloria J. Self; and Tract No. 30 of 4.317 acres sold to Billy R. Jones, and wife, Barbara Jones.

The plaintiffs rely upon the rule that a release of restrictive covenants is not effective unless all persons who own property in the restricted subdivision join in the release. *Smith v. Williams*, 422 S.W. 2d 168 (Tex. 1967); *Farmer v. Thompson*, 289 S.W. 2d 351 (Tex. Civ. App. 1956, writ ref'd n.r.e.). They assert that the release was ineffective, because there were three persons who held equitable title to lots in the subdivision who failed to join in the release upon which the defendants relied. The defendants say that they purchased their eight-acre lot for value and they took without notice of the non-joinder of the equitable owners. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (1947).

Contrary to the holding of the court of civil appeals, the plaintiffs had the burden to prove that the defendants purchased their lot with actual or constructive notice that the owners of equitable title failed to join in the release. The general rule in Texas, in other areas of the law, is that the one who relies upon

an equitable title to land as against a subsequent owner of the legal title assumes the burden of showing that the latter is not an innocent purchaser for value without notice. *Teagarden v. R. B. Godley Lumber Co.*, 105 Tex. 616, 154 S.W. 973 (1913); *Gillian v. Day*, 179 S.W. 2d 575 (Tex. Civ. App. 1944, writ ref'd); *Ratcliffe v. Mahres*, 122 S.W. 2d 718, 723 (Tex. Civ. App. 1938, writ ref'd); Lange, 4 TEXAS PRACTICE, *Land Titles* § 465 (1961). This court in *Curlee v. Walker*, 112 Tex. 40, 244 S.W. 497 (1922), stated that the correct rule governing restrictive covenants is stated in *Hooper v. Lottman*, 171 S.W. 270 (Tex. Civ. App. 1914, no writ), wherein the court wrote in part:

> So the general rule may be safely stated to be that where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvement thereon * * * a purchaser and his assigns may enforce the covenant against any other purchaser, and his assigns, *if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase.* (Emphasis added.)

The plainitffs failed to prove that the defendants purchased their lot with either constructive or actual notice that there were some owners of equitable title to land within the subdivision who failed to join in the release of the restrictions. Plaintiffs relied upon the one sentence of the affidavit, but it was not proof either of constructive or actual notice to defendants. The sentence does not locate any lands by survey, subdivision or county. It does not disclose the author of the affidavit. There is no other proof that the defendants possessed actual notice

of the contracts for deed. We conclude that the plaintiffs failed to discharge their burden to prove that the defendants were not good faith purchasers of their lot.

The judgments of the courts below are reversed, and judgment is here rendered dissolving the permanent injunction.

Jack Pope

Associate Justice

OPINION DELIVERED:
May 2, 1973

A-10

SUPREME COURT OF TEXAS

FROM ELLIS COUNTY, TENTH DISTRICT

No. B-3655

May 2, 1973.

W. D. AMASON, et al.,

v.

WALTER J. WOODMAN, et al.,

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Tenth Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the District Court and Court of Civil Appeals, it is, therefore, *adjudged, ordered* and *decreed* that said judgments be, and hereby are, reversed and set aside.

"And this Court now proceeding to render judgment as should have been rendered below, it is *considered, adjudged, ordered* and *decreed* that the judgment be, and hereby is, rendered dissolving the permanent injunction.

"It is further ordered that respondents, Walter J. Woodman and wife, Mrs. Walter J. Woodman, Bob McNeely and wife, Mrs. Bob McNeely and Gerald Miller and wife, Mrs. Gerald Miller, pay all costs in this cause expended and incurred in this Court, Court of Civil Appeals and District Court; that petitioners, W. D. Amason, and wife, Mrs. W. D. Amason, and

Wayne O. Glick and wife, Freddie Glick, have and recover of and from respondents, (above named), the costs by them expended and incurred in said Courts, and that this decision be certified to the District Court of Ellis County, Texas, for observance."

SUPREME COURT OF TEXAS

FROM ELLIS COUNTY, TENTH DISTRICT

No. B-3655

June 13, 1973.

W. D. AMASON, et al.,

v.

WALTER J. WOODMAN, et al.,

Respondents' motion for rehearing, filed in the above numbered and entitled cause on May 16, 1973, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

Rule 505. Decision

In each case, the Supreme Court shall either affirm the judgment, or reverse and render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial, subject to the provisions of Rules 503 and 504 relating to reversals.

Art. 6626. [6823] [4639] [4331] What may be recorded

The following instruments of writing which shall have been acknowledged or proved according to law, are authorized to be recorded, viz.: all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements, or goods and chattels, or moveable property of any description; provided, however, that in cases of subdivision or re-subdivision of real property no map or plat of any such subdivision or re-subdivision shall be filed or recorded unless and until the same has been authorized by the Commissioners Court of the county in which the real estate is situated by order duly entered in the minutes of said Court, except in cases of the partition or other subdivision through a court of record; provided that where the real estate is situated within the corporate limits or within five miles of the corporate limits of any incorporated city or town, the governing body thereof or the city planning commission, as the case may be, as provided in Article 974a, Vernon's Texas Civil Statutes, shall perform the duties hereinabove imposed upon the Commissioners Court.

Acts 1846, p. 236; P.D. 5004; G.L. vol. 2, p. 1542. Amended by Acts 1931, 42nd Leg., p. 371, ch. 217, § 1; Acts 1951, 52nd Leg., p. 745, ch. 403, § 1.